In the Matter of Merchant Mariner's Document No. Z-366184-D2 and all other Licenses, Certificates and Documents

Issued to: JOHN WEINER

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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JOHN WEINER

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 1 October 1954, an Examiner of the United States Coast Guard at New York, New York suspended Merchant Mariner's Document No. Z-366184-D2 issued to John Weiner upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as a wiper on board the American SS MORMACTEAL under authority of the document above described, on 29 March 1954 at about 0300, while said vessel was in the port of Buenos Aires, Argentina, he assaulted and battered a member of the crew named Luis Reinosa. A second specification, alleging that Appellant wrongfully engaged in an altercation with Reinosa, was found to be merged with the above specification.

On 6 July 1954, Appellant was served with the charge and specifications and ordered to appear at a hearing on 16 July 1954. Neither Appellant nor his counsel appeared at the commencement of the hearing on the latter date and the hearing was adjourned. On 19 July 1954, the hearing was reconvened in the presence of Appellant's counsel but the hearing was adjourned until 23 July because of the absence of the Investigating Officer's witness.

On 23 July 1954, the hearing was conducted in absentia since Appellant was not present or represented by counsel. The Investigating Officer testified as to the service of the charge sheet and also that he had given Appellant a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. After the Examiner entered pleas of "not guilty" to the charge and specifications and introduced in evidence of Louis Reinosa who was serving as a wiper on the MORMACTEAL at the time in question. Reinosa testified as follows:

At about 0300 on 29 March 1954, Appellant and Reinosa had an argument in the head and then Appellant departed. When Reinosa entered the forecastle which he shared with Appellant and another wiper called "Pepito," the overhead light was on and Appellant was sitting on his bunk. Appellant was angry and after a brief exchange of words with Reinosa, Appellant jumped on Reinosa and
repeatedly punched him in the face with both fists. Reinosa grabbed a knife from the table in order

to defend himself. The knife had been used at parties given by Appellant. "Pepito" stopped reading a book and separated the two seamen. Appellant went topside. Reinosa was bleeding and his nose was broken. Reinosa is taller than Appellant and slightly more than 30 pounds heavier. Reinosa is 38 years of age and Appellant is about 13 or 14 years younger than Reinosa. No legal action was taken in Buenos Aires in connection with this incident. "Pepito" said that he was going to return to Puerto Rico at then end of the voyage. (There is no wiper named Pepito listed on the Shipping Articles. The third wiper's name is shown as Teofilo Lazu.)

After the completion of Reinosa's testimony, the witness was excused and the Investigating Officer rested his case. After an adjournment of approximately one and a half hours, counsel for Appellant appeared and stated that his absence earlier in the day was due to a misunderstanding on his part. Counsel stated that he would like to have the opportunity to cross-examiner Reinosa. The hearing was then adjourned awaiting the preparation of a transcript of Reinosa's testimony for counsel.

On 29 July 1954, the hearing was reconvened. Counsel for Appellant was present and he stated that he had received a copy of Reinosa's testimony. Counsel also stated that Reinosa's testimony contradicted Appellant's version of the incident and requested an adjournment in order to take Appellant's testimony. Appellant's home is in Philadelphia. This request was granted by the Examiner.

On 21 September 1954, the hearing was reconvened with Appellant and his counsel present. Appellant then testified under oath and his testimony differed from that of Reinosa on the following facts:

Appellant and "Pepito" were asleep when Reinosa entered the forecastle with a knife and turned on an overhead light which awakened Appellant. After an exchange of words, Reinosa moved the 12-inch blade knife from behind his back and stabbed Appellant four times in the chest and shoulders. Appellant jumped out of his bunk, took the knife away from Reinosa and punched him about the face approximately 15 times. A Mate and the other wiper stopped the fight. Reinosa was wearing his glasses and they were broken when Appellant struck him between the eyes. Both men were arrested by the local police authorities and they were tried before a court in Buenos Aires. The court found Reinosa "guilty" and Appellant "not guilty."

After Appellant's testimony had been taken, the Examiner issued a subpoena for Louis Reinosa to appear at 1000 on 30 September 1954 for the purpose of cross-examination. The subpoena was given to Appellant's counsel to be served by a regular process server.

At 1055 on 30 September 1954, the hearing was reconvened. Neither Appellant or his counsel, nor Reinosa, were present and no word had been received from any of them since the issuance of the subpoena for Reinosa on 21 September. At 1200, the Investigating Officer commenced his closing argument and the hearing was then adjourned.

On 1 October 1954, the Examiner announced his decision in the presence of the Investigating

Officer. The Examiner concluded that the charge had been proved by proof of the specification. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-366184-D2, and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of six months - two months outright suspension and four months on twelve months probation. The original of the decision was mailed to Appellant's counsel on 6 October and received by him on 8 October.

On 11 October 2 1954, counsel for Appellant appeared before the Examiner and stated that he failed to attend the hearing on 30 September because of a confusion of dates through his own fault. Counsel then submitted an oral application to reopen the hearing on the ground that the subpoena for Reinosa was returned to counsel from the process serving bureau with the notation that the witness wa unknown at the address where the service of the subpoena had been attempted; and on the additional ground that there was newly discovered evidence in the form of a printed note purportedly signed by Reinosa which Appellant found in his gear and mailed to counsel subsequent to 21 September 1954. The undated note states that, on the night of 29 March, Reinosa walked into the forecastle with a knife while Appellant was asleep, woke him up, and cut him with the knife after a brief exchange of words. After argument by counsel and the Investigating Officer, the Examiner denied the application on the ground that there is no delegated authority from the Commandant for Examiners to reopen hearings after service of the Examiner's decision has been completed.

Appellant's notice of appeal and application to reopen the hearing were received by the Coast Guard on 29 October 1954. Therein, it is urged that:

POINT I. The Appellant has not had an opportunity to cross-examine Luis Reinosa.

POINT II. The charge and specification were found proved without corroborating evidence.

POINT III. Counsel did not appear on 30 September because he believed erroneously that the hearing had been adjourned until 11 October.

POINT IV. The subpoena issued for Reinosa could not be served on him at the address furnished by the Government.

POINT V. The newly found evidence, in the form of a statement by Reinosa, directly contradicted Reinosa's testimony but the statement was not placed in evidence.

POINT VI. The decision of the Examiner was contrary to the evidence in finding that the larger and taller Reinosa was acting in self-defense when he inflicted five knife wounds upon Appellant; that Appellant's wounds were superficial although the Public Health Service records show that Appellant was unfit for duty until 23 June 1954 (almost two months); and that the thrashing was not justified or necessary to repel further attack by Reinosa.

APPEARANCES: Messrs. Walsh and Levine of New York City

By William F. Walsh, Esquire, of Counsel

Based upon my examination of the record submitted, I hereby make the following.

FINDINGS OF FACT

On 29 March 1954, Appellant was serving as a wiper on board the American SS MORMACTEAL and acting under authority of his Merchant Mariner's Document No. Z-366184-D2 while the ship was in the port of Buenos Aires, Argentina.

At approximately 0300 on 29 March 1954, Appellant and Reinosa met in the head shortly after they had returned to the ship from shore leave. An argument developed about a pair of Appellant's dungarees and then Appellant went to the forecastle which he shared with Reinosa and another wiper known as "Pepito." Shortly thereafter, Reinosa entered the forecastle and Appellant told Reinosa to turn out the overhead light. An exchange of unfriendly words followed and Appellant jumped out of his bunk. As Appellant approached Reinosa, the latter picked up a galley knife from a table in order to defend himself. Appellant struck Reinosa in the face, broke his glasses and disarmed him after Appellant had received several superficial cuts from the knife. Appellant then proceeded to give Reinosa a thorough beating before the fight was stopped by the wiper "Pepito" and other personnel of the crew. Both men were arrested by the local police authorities but the record is not determined as to what, if any, action was taken against them. They later returned to the United States on another ship.

Reinosa is a larger man than Appellant but Appellant is younger and more athletic.

There is no record of prior disciplinary action having been taken against Appellant by the Cost Guard.

OPINION

As can be seen from the above review of the testimony of the only two witnesses who appeared at the hearing, the crux of the matter is whether Reinosa initiated the fight by stabbing Appellant or whether Reinosa picked up the knife in order to ward off a threatened attack by Appellant. The Examiner resolved the issue in favor of the latter version which is in substantial accord with the testimony of Reinosa.

As indicated in my above Findings of Fact, the Examiner also accepted the testimony of Reinosa with respect to most of the subsidiary issues which are material to the main question. The Examiner found that Reinosa did not have the knife when he entered the forecastle and that he did not pick up the knife until after Appellant was out of his bunk; but that the knife had been in the forecastle for use at a party given by Appellant and that Reinosa armed himself with the knife only after Appellant's attitude became aggressive. Such findings are more consistent with the subsequent events, that Appellant received only superficial wounds and Reinosa was the recipient of a severe beating, than is Appellant's claim that he was stabbed four times with a 12-inch blade while in his

bunk and then was still able to disarm Reinosa and beat him "all the way" (R. 68) with "about 15 punches" (R. 40). It is extremely improbable that Appellant would have been able to accomplish the latter feat if he had been attacked in his bunk. It is equally inconsistent that he would have received merely superficial wounds if he had been the victim of a surprise attack while lying in his bunk.

There is no support for the contention on appeal that Appellant was unfit for duty for almost two months. On the contrary, Appellant testified that he simply received first-aid treatment on the same night as the fight.

For the above reasons, I conclude that the findings of the Examiner, who was in the best position to judge the credibility of the witnesses, are in accord with the probabilities; that Reinosa acted in self-defense; that Appellant was the aggressor throughout the fight; and that Appellant's action grossly exceeded any force that was necessary for his safety even after Reinosa had possession of the galley knife. Since the Examiner substantially accepted Reinosa's version of the incident, this constituted substantial evidence although not corroborated by other evidence in the record.

On the question of the merits of the application to reopen the hearing, I agree with the Examiner's denial of the application.

Appellant's counsel neglected his opportunity to cross-examine Reinosa on 23 July after counsel was present at the hearing on 19 July and he had notice that the hearing was adjourned until four days later in order to obtain Reinosa's testimony. Again, on 30 September, counsel failed to put in an appearance or to pursue his expressed desire (to cross-examine Reinosa) by notifying the Examiner or the Investigating Officer that the subpoena for Reinosa could not be served. Counsel had physical possession of the subpoena which ordered Reinosa to appear at the hearing on 30 September. Nevertheless, counsel failed to contact the examiner prior to the rendering of his decision on 1 October. Regardless of the absence of the witness on 30 September, it is my opinion that the Examiner was justified in proceeding with the hearing after a delay of two hours on the latter date. No interest was displayed by counsel in his attempt to cross-examine Reinosa and this was the second occasion on which counsel had failed to put in an appearance for this purpose. These hearings must be conducted with a degree of regularity.

The so-called newly found evidence is not considered to be of such a character as to make it advisable to reopen the hearing. The alleged statement by Reinosa was matter which Appellant knew about or should have known about prior to 21 September which was more that two months after the commencement of the hearing on 16 July. This does not meet the requirement that newly discovered evidence must be matter that was not known to the applicant at the time of the hearing and that the applicant, with due diligence, could not have discovered prior to the date the hearing was declared closed by the Examiner. The Examiner should deny a petition or application to reopen a hearing unless the new evidence is shown to have a direct, material, and noncumulative bearing upon the issues presented by the charge and specification concerned; and unless a very good explanation is given for the failure to produce the evidence at the hearing. Since the latter

requirements has not been complied with, the application to reopen the hearing is denied.

After an appeal to the Commandant has been taken, Examiners are not authorized to consider a petition or application to reopen a hearing. Prior to such an appeal, Examiners may exercise their sound legal discretion with respect to reopening the hearing after the decision of the Examiner has been announced. This authority does not extend to reopenings to admit evidence which is merely cumulative, immaterial and, if received, could not have any bearing on the result. The same standards are applicable to admiralty and civil proceedings. Neville V. American Barge Line Co. (C.A. 3, 1954), 218 F.2d 190, 1955 AMC 194. The exercise of such discretion by an Examiner will not be interfered with on appeal unless there is a clear abuse of the discretion.

ORDER

The order of the Examiner dated on 1 October 1954 at New York, New York, is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 13th day of April, 1955.